Petition

Office - Supreme Court, U.S.
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81-1124

No. .....

IN THE

Supreme Court of the United States

GREAT AMERICAN SCREEN a/k/a BE-DOWN HOME DESIGNS and LEON DYMBURT,

Petitioners,

against

MUSIDOR, B.V. and MICHAEL PHILLIP JAGGER, KEITH RICHARDS, WILLIAM GEORGE WYMAN, CHARLES ROBERT WATTS, p/k/a THE ROLLING STONES,

Respondents.

GREAT AMERICAN SCREEN DESIGNS, LTD. a/k/a DOWN HOME DESIGNS, LTD., and LEON DYMBURT a/k/a LEON BORO,

Petitioners,

against

WINTERLAND CONCESSIONS CO., a California corporation, d/b/a WINTERLAND CONCESSIONS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Questions Presented for Review Are:

1. Does the prosecution of a civil defendant by the attorney for the civil plaintiff, with the assistance of the civil plaintiff, on a charge of criminal contempt for violation of an intermediate order in that proceeding violate the due process rights of the defendant?

2. Were the charges properly prosecuted when they were not prosecuted on an order to show cause or an order of arrest and were captioned solely in the civil case and in one instance, did not name the criminal defendant in the civil action or otherwise?

3. Is a small corporation charged with criminal contempt entitled to a jury trial when the fine to be imposed is not limited before trial and is imposed at $10,000.00?

4. If a charge of criminal contempt is to be prosecuted by a person other than the public prosecutor, and he is in no manner disqualified or unable to prosecute, must he be made aware of or consent to the prosecution by another?

5. Did the proof of the defendants' guilt comply with the constitutional mandate requiring proof beyond a reasonable doubt; did the conduct of the trial violate the defendants' rights to due process?

6. Was the sentence imposed excessive under the Eighth Amendment of the Constitution?

28 USC 2403 (a) may be applicable. The petitioners are unaware of any certification by any court pursuant to 28 USC 2403 (a) to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

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The Opinions Below Are Reported

District Court: —— FS ——

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The Ground Upon Which the Jurisdiction of the Court Is Invoked

i. the judgment of the District Court was entered April 22, 1981 and was affirmed by the Court of Appeals on August 21, 1981.

ii. a petition for rehearing and a suggestion for a hearing en banc were denied October 14, 1981.

iii. the statutory basis for jurisdiction is 28 US 1254.

The Constitutional and Statutory Provisions Involved Are

CONSTITUTION

Amendment 5

Amendment 8

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 42 (b)

UNITED STATES CODE

18 USC 401

28 USC 515

28 USC 516

28 USC 547

In the

Supreme Court of the United States

Great American Screen a/k/a Be-Down Home Designs and Leon Dymburt,

Petitioners,

against

Musidor, B.V. and Michael Phillip Jagger, Keith Richards, William George Wyman, Charles Robert Watts, p/k/a The Rolling Stones,

Respondents.

Great American Screen Designs, Ltd. a/k/a Down Home Designs, Ltd., and Leon Dymburt a/k/a Leon Boro,

Petitioners,

against

Winterland Concessions Co., a California corporation, d/b/a Winterland Concessions, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Facts

The plaintiffs instituted actions seeking to enjoin the use of certain trademarks, names and likenesses of the plaintiffs, compensatory and exemplary damages. Preliminary injunctions were issued in each case.

The plaintiffs, by counsel, alleged violations of the preliminary injunctions by the defendants and plaintiffs counsel was appointed to prosecute charges of criminal contempt.

After trial, the judge found the defendant Dymburt guilty of violating the preliminary injunction in the first case (Musidor) and not guilty in the second (Winterland) and the defendant Great American guilty of violating both. The defendant Dymburt was sentenced to a term of 60 days and the defendant Great American to concurrent fines of $10,000.

The jurisdiction of the District Court was based upon the alleged violation of preliminary injunctions issued by that court and a charge of criminal contempt under 28 USC 401.

(a) Musidor Action

On June 30, 1978, a preliminary injunction was issued by Hon. Eugene Nickerson enjoining Great American (and others) from commercially exploiting, in various manners, the rock group known as the Rolling Stones. (A temporary restraining order had been issued on June 23, 1980 (70)).

Paul Keim worked for Down Home Designs, Ltd and its successor, Great American Screen Designs, Ltd, as a silk screen technician (44) from June, 1977 to May, 1979 (45).

According to Keim, on June 17, 1978, he was told by Leon Dymburt, to move 10-20 screens, all relating to the "Rolling Stones", to the basement, to be hidden (63-64, 83-85, 120). He further testified that through July, 1978, the defendants continued to print Rolling Stones t-shirts but that beginning June 17, 1978, that printing was done by night shifts working five nights a week (64-65, 122-123). The process described by Keim was the screens secreted

in the basement were taken up stairs to be printed by the night shift and then taken back to the basement (86). While Keim only worked the day shift, he testified that he assisted in moving the screens upstairs on a couple of occasions and that before he left at night he saw the screens set up on the press to be run and that when he returned in the morning the shirts were "boxed" in plastic bags waiting to be picked up by salesman (65-66, 86-87, 124). Keim described the shirts printed in July, 1978 as depicting a dragon, a picture of Mick Jagger and the words "Rolling Stones"[1] (67-68).

Keim testified that the screens for the "Rolling Stones" were moved back and forth from the basement on the freight elevator with the assistance of the superintendent, "Kelly" and his assistant who ran the elevator during the day (83-88). When Keim was involved in moving the screens, Kelly always assisted him (133).

Windolph Kelly was the superintendent of the building in question from December, 1976 to March, 1980 (449). Mr. Kelly does not know Paul Keim, did not assist anyone in taking screens to the basement and Great American Screen Designs, Ltd never stored anything in the basement (451-52, 463-64). From January, 1978 to December, 1978, Osbourne Traill was the elevator operator[2] and assistant to Mr. Kelly (512-13). During that time Mr. Traill was not asked to and did not take silk screens to the basement for storage (514-15).

While Keim was working for Great American Screen Designs, Ltd, he was using drugs (94-95, 148), and refused to answer whether he attempted to sell drugs to other employees on the premises, invoking his constitutional

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[1] There was no evidence that t-shirts were sold at any concerts, or any place after June 17, 1978.

[2] Only one elevator, the freight elevator, has an operator and it is the only elevator which goes to the basement (450, 472, 513).

privilege against self incrimination (149). He insisted that he was not dismissed for reasons relating to drugs but that he left in May, 1979 of his own free will (45, 77, 149).[3] In 1980, Keim made an OSHA complaint against Great American Screen Designs, Ltd.

Keim, who is still employed as a silk screen technician (44), during late May or early June, 1980, read an article about the lawsuit that was pending and contacted plaintiffs' attorney, and volunteered his time (92-93, 144).[4] Keim had previously sought employment as a rock drummer and in response to counsel's question, advised him that he was an accomplished drummer (140-41). Keim also spoke to counsel about employment making silk screens or other designs for the rock groups represented by him and by Winterland (110-11), and was told not to accept anything from any company during the time of his testimony but that afterwards possibly a company could show their appreciation (112). Keim understood that that appreciation could be a job working for Winterland or money (113, 179).

(b) Winterland Action

On November 30, 1979, a preliminary injunction was issued by Hon. Eugene Nickerson, enjoining Great American (and others) from commercially exploiting in various manners, the rock groups known as Grateful Dead and Fleetwood Mac.

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[3] In his affidavit in opposition to the plaintiffs' motion to designate a special prosecutor, Mr. Dymburt said of Keim, he is a "former employee who was not retained because of a pattern of drug dealing and drug using on the premises" (docket entry 84).

[4] The summons and complaint in the Musidor action, the only one about which Keim claimed to have information, were served two years earlier in June, 1978, while Keim was still employed by the defendants.

On May 14 and 16, 1980, John McNally, a licensed private investigator retained by the plaintiffs conducted surveillances on the building in which the defendants' factory was located (183).

On May 14, 1980, at about 2:05 p.m. Sebastian Trapani arrived at the premises, driving a station wagon (188), removed three duffle bags from the rear and entered the building (190-91). Trapani exited the building carrying at least four cellophane bags containing t-shirts, put them in the rear of his vehicle, talked to someone in the window and then drove away (191). An attempt to follow him was unsuccessful (192).

At 3:15 p,m, a blue Dodge van arrived and the driver entered the building (192). Fifteen to twenty minutes later he exited, placed at least three cellophane bags in the rear and drove away (192). McNally followed the van to an apartment complex and, when the driver left, looked in the van and saw, among other things, three cellophane bags of t-shirts (192-93). Having seen the same shirts in the office of counsel for the plaintiff and, having seen the words, but yet not being able to see the whole thing that said "Grateful Dead", McNally "knew" they were "Grateful Dead" t-shirts (193-94, 246).

The driver returned to the van, left the area, picked up another man and proceeded to Nassau Coliseum (195). At the Coliseum, McNally purchased a Grateful Dead T-shirt (exhibit C) from the passenger (195-97). McNally then purchased three jerseys (exhibit D (1) (2) (3) from an unknown black male in the vicinity (198-99).

On May 16, 1980, a Nova arrived at the building where the defendants' factory was located and the driver entered the building while two passengers waited in the car (201-02). The driver said to the elevator operator "fifth floor my man" (202) but McNally doesn't know on what floor the elevator stopped (227-28). A short while later

the man exited with an arm load of cellophane bags containing T-shirts and, with the assistance of the passengers, put them in the trunk (202-03). McNally could not see the design on the shirts (202-03), and does not know what was in the trunk before they were placed in there (215).

McNally followed the Nova to Nassau Coliseum and waited for the men to divide the shirts (203). He then purchased two "Grateful Dead" t-shirts (Ex. B 1 & 2) from the driver of the car (203-04).

McNally did not know where the cars which approached the building had come from or what they had in their trunks upon arrival (238-39, 242, 215). McNally could not see anything that was printed on any of the shirts as they were removed from the building (202-03, 246-47), even though the contents of the packages could be seen by anyone in an appropriate position (244). McNally did not look at the name on the hang tags of the shirts he purchased, and was either instructed not to put a mark on the shirts, though he knew that to be the proper method of identification, or told it was not necessary and thus could only say that the exhibits were similar "in all respects" to those purchased (219-22). The witness was a qualified investigator (183), but had no expertise in the manufacture or printing of t-shirts.

Keim attempted to identify the t-shirts in exhibits B, C and D as having been printed by Great American Screen Designs, Ltd. (159) but they could have been made by someone else (160), as anyone with the same machine could produce them (164), even him (163-64). Allen Weingartner from Precision Screen Machines testified that the shirts in exhibits B, C and D could have been produced on any of their machines (328-29, 332-33) or a competitor's machine (331-33) and that the color overlay technique used is not unique (329).

Great American Screen Designs, Ltd. used machines manufactured by Precision Screen Machines to print t-shirts (90, 338). A number of other companies, including the company by which Keim was employed (Primo) and one of the plaintiffs (Winterland) also had Precision Screen Machines (90, 334, 341).

POINT I

The guilt of the defendants was not proved beyond a reasonable doubt.

"Criminal contempt is a crime in every fundamental respect" (*Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)), and a defendant charged with same is presumed innocent until his guilt is proved beyond a reasonable doubt (*Gompers* v. *Buck's Stove and Range Co.*, 221 U.S. 418 (1911)). Considering the evidence in the light most favorable to the plaintiffs, there is no proof beyond a reasonable doubt of the guilt of the defendants and the entry of a judgment based upon a failure of such proof violates the Constitution (*Jackson* v. *Virginia*, 443 U.S. 307 (1979)).

(a) Musidor Action

Paul Keim was the only witness on the merits[5] against the defendants and there was no real evidence. Keim was not a credible witness, and was interested and vindictive and his testimony standing alone was insufficient to prove guilt beyond a reasonable doubt.

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[5] Joseph Rascoff provided evidence relating to a Rolling Stones tour, but not about any t-shirts; three attorneys testified to knowledge of the orders.

The statements attributed by Keim to Charles Taublieb are, even if made, immaterial as they relate to events one week before even the temporary restraining order was issued (68-70).

Keim admitted using drugs on the defendants' premises and invoked his constitutional privilege against self-incrimination when asked whether he had attempted to sell drugs to other employees on the premises (149). While he testified that he did not believe that Mr. Dymburt gave information to the authorities about his attempts to sell drugs (149), he yet showed his vindictiveness, whatever its source, by making an OSHA complaint against the defendants in 1980, even though he had left their employ in May, 1979 (45, 172).*

Keim sought out the plaintiffs attorney and volunteered his services (92-93, 144). He did not fail to advise the attorney that he had sought employment as a rock drummer (140-41) and that he was interested in making silk screens for the rock groups represented by him and plaintiff Winterland (110-11). He was told that after the trial possibly a company could show their appreciation, a statement Keim understood could mean a job working for Winterland or money (113, 179).

Keim testified that after the issuance of the Musidor injunction the defendants continued to print Rolling Stones t-shirts and that the printing was done at night, five nights a week and, when not being used, the screens were hidden in the basement (64-65, 86, 122-23). He further testified that he never participated in the nighttime operation or observed same but that the screens were moved back and forth by the superintendent "Kelly" and his assistant and that on occasion he had helped (83-88, 133). It was based solely upon that testimony that the defendants were convicted.

Both Windolph Kelly, who was the superintendent from December, 1976 to March, 1980, and his assistant from

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* The inspection was made on June 16, 1980 (172), shortly after Keim met the plaintiffs attorney (144) and became involved in the instant prosecution (his affidavit was signed June 5, 1980).

January to December, 1978, Osbourn Traill unequivocally denied knowing Keim and denied taking silk screens or any items to the basement for storage (449, 451-52, 463-64, 512-15). Douglas Davis, who was Kelly's assistant from December, 1978 to March 1980, likewise denied taking screens or any goods to the basement for Great American (471-74).

The evidence was insufficient to support a conviction for violating the Musidor injunction.

(b) Winterland Action

John McNally surveilled the defendants' premises on two days and saw three people leave carrying clear plastic bags of t-shirts, put them in their cars and drive away (183, 191, 192, 202-03). McNally could not see anything which may have been printed on the t-shirts but same could have been seen by anyone in an appropriate position (202-03, 244, 246-47). In fact McNally was never able, other than by surmise and speculation, to determine what was in those bags.

McNally did not know where those cars had come from or what they contained when they arrived at the defendants' premises (238-39, 215, 242). McNally followed the second vehicle and when it was parked, looked in and saw three cellophane bags containing what he "knew" were Grateful Dead t-shirts (192-94, 246) and surmised that they came from the defendants' premises. McNally followed the second and third cars to the Nassau Coliseum and purchased Grateful Dead t-shirts from the occupants of each (195-97, 203-04). There was no evidence that the shirts purchased came from the defendants' premises.

McNally, who was paid by plaintiff Winterland to conduct the investigation (233) was either told not to mark the shirts purchased (219) or told that marking the bags was sufficient (220), even though he knew the proper way

would have been to mark the shirts (219). McNally was not able to identify the exhibits as those purchased and was only able to say there were "similar in all respects" (221). There was no evidence that the t-shirts admitted in evidence were those purchased by McNally and turned over to counsel for the plaintiffs

Allen Weingartner, from Precision Screen Machines, testified that the exhibits could have been printed on one of their machines or a competitors (331-33), that anyone in the world with the appropriate machine could have made the exhibits (329, 332-33, 341) and that both plaintiff Winterland and the defendant use their machines (334, 338, 341). Keim attempted to identify the exhibits as having been made by Great American (159-60) but admitted that he or other persons with the proper machines could reproduce the exhibits (163-64); there was no evidence that the exhibits were produced by the defendants.

The evidence was insufficient to prove the guilt of the defendants beyond a resonable doubt.

POINT II

To permit a criminal contempt to be prosecuted by the attorney for a civil litigant violates the due process rights of the defendant.

The defendants were charged with having violated preliminary injunctions in two pending actions. The entire criminal prosecution was made, put together and prosecuted by the plaintiffs.

In the civil actions the plaintiffs seek millions of dollars damages but it appears that that is not the only relief they seek. On June 23, 1981 (p. 6) in the Musidor action counsel for the plaintiffs stated, ". . . I will be very frank, it is my keen desire to publicize this case" and the subsequent publicity (defendants pre-sentence memorandum Musidor

documents 12, 13) shows that the more detrimental that publicity is to the defendants the more beneficial it is to the plaintiffs. It was clearly the plaintiffs' intention in paying for the investigation and in having their attorney prosecute to obtain negative publicity against the defendants which would have the two pronged effect of destroying their business and warning others what might happen to them, thus increasing the profits available to the plaintiffs.

If for no reason other than the fact that even the appearance of impropriety must be avoided in judicial proceedings, counsel for the plaintiffs should not have been assigned by the court to prosecute the defendants.

> "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter" (ABA Model Code of Professional Responsibility, DR 7-105).

"In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases" (*Bloom* v. *Illinois,* supra, 207) and ". . . proceedings at law for criminal contempt are between the public and the defendant and are not part of the original cause" (*Gompers* v. *Buck's Stove & Range Co.,* 221 US 418, 445 (1911); *Bray* v. *United States,* 423 US 73 (1975)).

The United States Attorney must prosecute all offenses against the United States (28 USC 547, 515) and any evidence must be secured by the Department of Justice (28 USC 516). The courts will not recognize any action prosecuted on behalf of the United States unless it is brought in the name of the government (*Gompers* v. *Buck's Stove and Range Co., supra; Latrobe Steel Co.* v. *United Steel Workers,* 545 F2d 1336 (3 Cir 1976)), and is prosecuted by the "district attorney or someone designated by him" (*Confiscation Cases,* 7 Wall, 454, 457 (1869)), for "a private citizen lacks a judicially cognizable interest in

the prosecution of non-prosecution of another" (*Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973)).

The only proper fuction of a civil litigant in a prosecution for criminal contempt arising out of the civil action is filled "when he calls to the court's attention facts which may constitute criminal contempt" (*Kienle* v. *Jewel Tea Co.*, 222 F.2d 98, 100 (7 Cir 1955)). He is not properly assigned to prosecute the other party for criminal contempt. (*In Re Lahm Industries Inc.*, 609 F2d 567, (1 Cir 1979); *Ramos Colon* v. *United States Attorney for District of Puerto Rico*, 576 F2d (1 Cir 1978); *Brotherhood of Locomotive Firemen and Enginemen* v. *United States*, 411 F2d 312 (5 Cir 1969); *Kienle* v. *Jewel Tea Co.*, supra.[7]

> "This transcends the matter of competence, character and professional trustworthiness. Indeed, it is the highest claim on the most noble problem—fidelity, unquestioned, continuing fidelity to the client.
> "It is the experience of this Court that the National Soverign, through its chosen law officers, should be in control of criminal contempt proceedings. Only in this way can we have the assurances that the contentions, both factual and legal, of the prosecution are thought by responsible governmental officials to be the policy that the court should adopt". *Brotherhood of Locomotive Firemen and Enginemen* v. *United States*, supra, 319-20

That permitting the plaintiffs to control the prosecution through their attorney and the securing of evidence by people financially indebted to them deprived the defendants of due process is illustrated by the evidence presented. The witness on one charge, Paul Keim, hoped, and probably expected, that he would be rewarded financially by the plaintiffs for his testimony on their behalf and the witness

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[7] Contra, *McCann* v. *New York Stock Exchange*, 80 F2d 211 (2 Cir 1935), cert den *McCann* v. *Leibell*, 299 US 603).

on the other charge, John McNally, an experienced police officer, contrary to his training, and at the direction of the plaintiffs, did not properly mark evidence ,thus enabling a "switch". A criminal defendant has a right to be prosecuted by a neutral prosecutor, a representative of all the People.

The prosecution of the defendants by the plaintiffs and those retained by them, deprived the defendants of due process.[8] To the extent that Rule 42b (Federal Rules of Criminal Procedure) permits the prosecution of criminal charges by one civil litigant against another, it is unconstitutional. Under the circumstances, the plaintiffs' attorney "cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused" (*Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971), quoting *In re Murchison*, 349 U.S. 133, 137 (1955)).

POINT III

The charges were improperly prosecuted.

Rule 42b requires prosecution of a charge of criminal contempt by an "order to show cause or an order of arrest". Neither issued in the instant case. The only "pleading" was an application in which counsel for the plaintiffs sought an order "directing the United States Attorney or appointing a special attorney to prosecute charges of criminal contempt". The papers were endorsed "Motion Granted Parcher & Herbert PC are appointed so ordered Eugene H. Nickerson". The next step required by Rule 42b, an application by the appointed attorney for an order to show cause or order of arrest was not taken.

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[8] The conclusion by the Court of Appeals that no violation of the defendants rights appears on the record merely serves to illustrate the dangers of a prosecution by the plaintiffs as it is the making of the case, not its presentation to the court which presents the opportunity for improper practices.

". . . Proceedings at law for criminal contempt are between the public and the defendant, and are not part of the original cause." (*Gompers* v. *Bucks Stove & Range Co.*, supra, 445). The prosecution must be brought in the name of the government. (*Latrobe Steel Workers*, 545 F2d 1336 (3 Cir 1976)).

> "This is not a mere matter of form for manifestly every citizen, however unlearned in the law, by mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecuton, whether it sought to benefit the complainant or vindicate the court's authority". *Gompers* v. *Buck's Stove & Range Co.*, supra, 446.

It is only when the United States is a party to the civil action and the prosecutor of that criminal contempt that the case can be properly captioned under the civil title (*United States* v. *United Mine Workers of America*, 330 U.S. 258 (1974)).

Leon Dymburt was not a named defendant in the Musidor- "Rolling Stones" action and the only notice given to him was the service of a notice of motion on the attorney who represented him in another action. The notice of the "charges" does not comport with the requirements of due process.

Throughout the trial the matter was treated as a civil one, as for example, when counsel for the plaintiffs, acting in the role of prosecutor, stated, "I intend to ask Mr. Dymburt to take the witness stand" (134). While same was not done, the statement yet illustrates the confused nature of he proceedings.

In the "memorandum and order" of Judge Nickerson finding the defendants guilty of violating the Musidor- "Rolling Stones" injunction, it is stated that the defend-

ants were charged with distributing "shirts at fourteen concerts[*] subsequent to the issuance of the order" and it is found that "Great American continued through July, 1978 to print and distribute large numbers of shirts." The only testimony relating to the distribution of large numbers of t-shirts referred to a concert on June 17, 1978 (68-70) *before* the preliminary injunction or even the temporary restraining order (70). As it appears that the conviction may have been based in part upon evidence of conduct which violated no order, the defendants were denied due process (*Eaton* v. *City of Tulsa,* 415 US 697 (1974)).

Due process requires a jury trial in criminal contempt cases as in any other criminal case (*Bloom* v. *Illinois,* 391 US 194 (1967)). The "charge" against the defendant Great American was a serious contempt and the defendant had a right to trial by jury (see *Muniz* v. *Hoffman,* 422 US 454 (1975)).

The prosecution of the "charges" against the defendants deprived them of their constitutional rights and the judgment of conviction should be reversed and any accusatory instrument dismissed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: White Plains, New York
December 11, 1981

Respectfully submitted,

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[*] There was evidence that there were fourteen concerts but none of distribution at any of those concerts.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MUSIDOR, B.V. and MICHAEL PHILLIP JAGGER, KEITH RICHARDS, WILLIAM GEORGE WYMAN, CHARLES ROBERT WATTS, p/k/a THE ROLLING STONES,

Plaintiffs,

- against -

SCORPIO SCREENS and GREAT AMERICAN SCREEN a/k/a BE-DOWN HOME DESIGN,

Defendants.

----------X

MEMORANDUM AND ORDER

78 C 1273

WINTERLAND CONCESSIONS CO., a California corporation, d/b/a WINTERLAND PRODUCTIONS, et al.,

Plaintiffs,

- against -

PLYMOUTH MILLS, et al.,

Defendants.

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79 C 2893

PARCHER & HERBERT P.C.
(Peter A. Herbert, Esq.,
of Counsel)
New York, New York
appearing on behalf of the Court

SEIDMAN & DOCHTER, P.C.
(Irving P. Seidman, Esq. and
Lawrence H. Silverman, Esq.,
of Counsel)
New York, New York
for Great American Screen Designs, Ltd. and Leon Dymburt

NICKERSON, District Judge

By motion filed June 11, 1980, the law firm of Parcher & Herbert, P.C., sought an order pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, directing the United States Attorney or appointing a special attorney to prosecute charges of criminal contempt of orders of this court, namely, a preliminary injunction order issued in 78 C 1273 ("the Musidor action") on June 30, 1978 and a preliminary injunction order issued in 79 C 2893 ("the Winterland action") on November 30, 1979 and amended

(in matters not here material) by order issued June 20, 1980.

The order of June 30, 1978 in the Musidor action preliminarily enjoined the defendants Great American Screen Designs, Ltd. a/k/a Great American Screen a/k/a Be-Down Home Design a/k/a Down Home, "its affiliates, predecessors, successors or assigns, and all officers, directors, agents, servants, employees, consultants and any other individual and entity in any way related to or associated" with defendants from manufacturing, distributing, selling or otherwise commercially exploiting or dealing in any goods on which was displayed a trademark of the name of the musical group known as The Rolling Stones or the names or likenesses of the four members of The Rolling Stones.

The order of November 30, 1979 in the Winterland action preliminarily enjoined, among others, Leon Dymburt a/k/a Leon Boro, Great American Screen Designs Ltd. a/k/a Down Home Designs, Ltd. and Down Home Designs, Ltd. and their officers, directors, servants, agents, consultants, employees, affiliates, successors and/or assigns and/or any other individual or entity in any way related to those corporate defendants from manufacturing, distributing, selling or otherwise commercially exploiting goods on which was displayed the trademarks, names or likenesses of any of the plaintiffs including those members of the musical group known as The Grateful Dead.

The court appointed Parcher & Herbert, the attorneys for the plaintiff in both the Musidor and the Winterland

actions, as special attorneys to prosecute the charges. The court held hearings on December 5, 8, 9, 10, and 11, 1980, at which Great American Screen Designs, Ltd. and Dymburt were represented by counsel.

The following constitutes the court's findings of fact beyond a reasonable doubt and conclusions of law.

In substance the charges were that Great American Screen Designs, Ltd. ("Great American") and Dymburt were guilty of criminal contempt of the orders in that they deliberately continued to print and sell T-shirts with The Rolling Stones trademark, name and likeness in July 1978, distributing the shirts at fourteen concerts subsequent to issuance of the order in the Musidor case, and in that in May 1980 Great American and Dymburt printed and

thereafter distributed at concerts T-shirts with the trademark, name and likeness of The Grateful Dead.

Dymburt submitted an affidavit, sworn to June 18, 1980 before Robert T. Anker, of counsel to Jeffrey S. Langberg, in opposition to the motion to designate a prosecutor of the charges. In the affidavit Dymburt states, among other things, that he is president of Great American, that "if at any time prior to 'The First Injunction' I printed any T-shirts without a license, I ceased immediately after The Rolling Stones injunction," that "I have never since violated that injunction," that "neither I nor Great American had anything whatsoever to do with the Grateful Dead concert in question," and that "under the terms of the preliminary injunction outstanding, I would not print, manufacture or

distribute any goods in defiance of that injunction." Dymburt did not testify at the hearings.

Paul Norman Keim was the chief witness for the prosecution on the alleged contempt of the order in the Musidor case. The court found his testmony credible. In June 1977 he was hired by Dymburt for Great American (then known as Down Home Designs) as head of the screen department. Great American was in the business of printing designs, primarily of so-called rock groups, on T-shirts. Dymburt finally approved the designs to be utilized as well as the quantity of shirts to be made and the concerts where they would be sold.

Some time in June 1978 Dymburt told Keim that a complaint has been made about Great American printing Rolling Stones

shirts. Dymburt at that time issued orders that all the screens and the acetates of art work for Rolling Stones designs be hidden in the basement of the building and that the printing be done at night. The Rolling Stones shirts were thereafter printed five nights a week. Great American continued through July 1978 to print and distribute large numbers of shirts having the Rolling Stones name and the likeness of Mick Jagger, one of the musical group so named.

The court finds that both Dymburt and Great American deliberately violated the court's order of June 30, 1978. They both had actual knowledge of the order and are therefore bound by it. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129 and n.4 (2d Cir. 1979); United States v. Hall, 472 F.2d 261 (5th Cir.

1972); United States v. Thompson, 261 F.2d 809 (2d Cir. 1958), cert denied, 359 U.S. 967 (1959). The court rejects their contention that they had no such knowledge. Dymburt admitted in his affidavit in opposition to the motion that "if at any time prior to 'The First Injunction' I printed any T-shirts without a license, I ceased immediately after The Rolling Stones injunction" and "I have never since violated that injunction." The only inference which can be drawn from these statements is that Dymburt had knowledge of the order.

But even disregarding this affidavit the court finds beyond a reasonable doubt that Dymburt knew in July 1978 that he had been ordered by this court not to print or distribute Rolling Stones shirts. Such knowledge is properly inferred beyond a reasonable doubt from Dymburt's

instructions to hide the screens and art work and to print at night. Furthermore, the testimony of Steven Samuel Ezon, the lawyer who appeared in court for Great American in the Musidor action, reinforces the conclusion that Dymburt had such knowledge. The court found Ezon's testimony credible.

After the papers seeking a preliminary injunction were served on Great American, Ezon met with Dymburt and some others from Great American and informed them that Musidor was seeking to enjoin them from printing Rolling Stones T-shirts. Ezon was "shocked" at the testimony of Dymburt's brother Michael given at a hearing on June 23, 1980, and consented on the record to issuance of a preliminary injunction which was "so ordered" by the court.

Ezon then informed Jeffrey Langberg,

counsel of record to Great American, and Michael Dymburt of the preliminary injunction. In addition Ezon called Great American and, not able to get anyone in authority, left a message to return the call. Thereafter Ezon spoke with Dennis Sorin, who was treasurer of Great American, and advised him of what the court had prohibited. As Ezon testified, "[i]t was a total conversation." Ezon described Sorin as part of the "buddy fraternal kind of organization" at Great American and testified that it was fair to say that Dymburt knew about what was going on. In addition, Langberg, counsel for Great American, admitted that he was aware "at some time that there was a preliminary injunction."

The court finds beyond a reasonable doubt that Dymburt and Great American committed contempt of the order in the

the Musidor case.

The chief witness for the prosecution with respect to the alleged contempt of the order of November 30, 1979 in the Winterland case was John Edward McNally, a licensed private investigator and formerly a first grade detective in the New York City police force. The court found his testimony believable. He testified that on May 14, 1980 he saw one Sebastian Trapani come in a station wagon to the factory building at 144 Spencer Street, Brooklyn, on the fifth floor of which Great American conducted its operation. Trapani entered the building and soon thereafter emerged with at least four cellophane bags containing T-shirts and placed them in the rear of the station wagon. He then had a brief conversation with a person leaning out of the fifth floor window.

Trapani then drove in an evasive manner, and McNally left him and returned to 144 Spencer Street. A man in a blue Dodge van soon pulled up and went into the building. He came out in about fifteen or twenty minutes, placed at least three of the same kind of cellophane bags in the rear of the van, and drove off. McNally followed, and, when the man made a stop and entered an apartment at 3728 Avenue K in Brooklyn, McNally peered into the rear of the van and observed three cellophane bags of T-shirts with Grateful Dead designs.

The van, followed by McNally and his son, then drove to the Nassau Coliseum, where the son purchased a Grateful Dead T-Shirt from the passenger of the van. McNally also purchased three identical shirts from an unknown black male at the Nassau Coliseum.

Two days later, on Friday May 16, 1980, McNally saw a Chevy Nova pull up near 144 Spencer Street. (This was the same automobile McNally had seen near the Nassau Coliseum on May 14, 1980.) The operator of the automobile then went into 144 Spencer Street and asked the person operating the elevator to stop at the fifth floor. Shortly thereafter the same man came out of the building with an arm load of cellophane bags containing T-shirts. He and two others who were in the vehicle then proceeded to the Nassau Coliseum where McNally purchased two Grateful Dead T-shirts from the operator of the vehicle

There is no doubt that if Great American and Dymburt had knowledge of the November 30, 1979 order in the Winterland case they were guilty of contempt. Plainly Great American had such knowledge.

Whether Dymburt also knew that he was enjoined is a more difficult question.

Anker acted of counsel to Langberg as attorney for Great American at the hearing on the motion to enjoin. Prior to appearing in court both Anker and Langberg met with Dymburt, who said he had not been served with the order to show cause. Anker, while he appeared for Great American raised the objection that Dymburt had not been served. Anker was present when the court granted the preliminary injunction motion and also when the court asked for submission of papers as to whether Dymburt had been served.

Anker testified that he had no specific recollection of informing Dymburt of the entry of the preliminary injunction order and that he was fairly certain he did not telephone Dymburt about

it. Anker did meet personally with Dymburt on January 17, 1980 to discuss with him the prospective depositions in the case.

Langberg testified that he knew Dymburt and Great American were named defendants but did not recall Anker informing him of the results of the motion. Nor did Langberg recall informing Dymburt.

Dymburt was not personally served with the order of November 30, 1979, and there is no direct testimony that he was told of it. Despite the nature of the testimony of Anker and Langberg, asserting that they did not inform Dymburt, as president and chief figure in their client Great American, of what must have been of critical importance in the lawsuit, the court, where the proof must be beyond a reasonable doubt, has decided not to draw a negative infer-

ence from the lawyers' testimony. It is conceivable that Dymburt supposed he was not enjoined in his own name and that he did not know that the order enjoined not only Great American but also its officers and directors.

It is true that Dymburt in his affidavit in opposition to the motion to direct prosecution of the alleged contempts states "unequivocally that neither I nor Great American had anything to do with the Grateful Dead concert in question." He also states that "under the terms of the preliminary injunction outstanding, I would not print, manufacture or distribute any goods in defiance of that injunction." Perhaps one could infer Dymburt's knowledge from this language and from the falsity of his statement concerning Great American. Indeed, the court is persuaded by a preponderance of

the evidence that Dymburt did know of the order and deliberately violated it. But to hold Dymburt in contempt the court must find him quilty beyond reasonable doubt and the court has a reasonable doubt.

The court finds Leon Dymburt and Great American guilty of contempt of the June 30, 1978 order in the Musidor action and finds Great American guilty and Leon Dymburt guilty of contempt of the November 30, 1979 order in the Winterland action.

The court directs the Probation Department to conduct a presentence investigation of Leon Dymburt and Great American and to report to the court. Sentence will be imposed on April 3, 1981 at 11 A.M. So ordered.

Dated: Brooklyn, New York
Feburary 5, 1981

Eugene H. Nickerson,
U.S.D.J.

The Clerk shall make copies of this Memorandum and Order and serve it upon the parties and the Probation Department, Eastern District of New York.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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B.V. MUSIDOR et al

Pltff.

-v-

GREAT AMERICAN SCREEN aka
BE-DOWN HOME DESIGNS

Deft.

----------X

JUDGMENT
ON
CONTEMPT

78 C 1273

JUDGE
NICKERSON

A MEMORANDUM AND ORDER having been filed by the Honorable Eugene H. Nickerson, United States District Judge, on February 9, 1981, finding Leon Dymburt guilty of criminal contempt of the Court's order of June 30, 1978, in the Musidor action and not guilty of contempt of the November 30, 1979 order in the Winterland action,

IT IS HEREBY ORDERED AND ADJUGED that Leon Dymburt is sentenced to the custody of the Attorney General for imprisonment for a period of sixty (60)

axx

days; execution of sentence is stayed pending appeal, and

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk of the Court deliver certified copies of this judgment to the United States Marshal, the United States Attorney, the Probation Department and the Pretrial Services Agency, all for the Eastern District of New York.

EUGENE H. NICKERSON
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF N.Y.

DATED: BROOKLYN, NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

B.V. MUSIDOR et al

Plaintiff

-v-

GREAT AMERICAN SCREEN aka
BE-DOWN HOME DESIGN

Defendant

----------X 78 C 1273

WINTERLAND CONCESSIONS CO et al 79 C 2893

Plaintiff

-v-

PLYMOUTH MILLS et al

Defendant

----------X

JUDGMENT ON CONTEMPT

A MEMORANDUM AND ORDER having been filed by the Honorable Eugene H. Nickerson, United States District Judge, on February 9, 1981, finding Great American Screen Designs, Ltd. guilty of criminal contempt of the Court's June 30, 1978 order in the Musidor action and of the Court's Novem-

ber 30, 1979 order in the Winterland Action,

IT IS HEREBY ORDERED AND ADJUDGED that Great American Screen Designs, Ltd. is sentenced to pay a fine of $10,000.00 to run concurrent on each case; execution of sentence is stayed until April 24, 1981, and

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk shall deliver certified copies of this Judgment to the United States Marshal, the United States Attorney and the Probation Department, all for the Eastern District of New York.

EUGENE H. NICKERSON
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

DATED: BROOKLYN, NEW YORK

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1535—September Term, 1980

(Argued June 9, 1981 Decided August 21, 1981)

Docket No. 81-1140

MUSIDOR, B.V., and MICHAEL PHILLIP JAGGER, KEITH RICHARDS, WILLIAM GEORGE WYMAN, CHARLES ROBERT WATTS, p/k/a THE ROLLING STONES,

Plaintiffs-Appellees,

—v.—

GREAT AMERICAN SCREEN, a/k/a BE-DOWN HOME DESIGNS and LEON DYMBURT,

Defendants-Appellants.

WINTERLAND CONCESSIONS CO., a California Corporation, d/b/a WINTERLAND CONCESSIONS *et al.*,

Plaintiffs-Appellees,

—v.—

GREAT AMERICAN SCREEN DESIGNS, LTD., a/k/a DOWN HOME DESIGNS, LTD., and LEON DYMBURT,

Defendants-Appellants.

Before:

OAKES and KEARSE, *Circuit Judges,*
and RE, *Chief Judge, United States Court of International Trade.**

Appeal from convictions of criminal contempt by the United States District Court for the Eastern District of New York, Eugene H. Nickerson, Judge. Held, appointment of civil plaintiff's counsel to prosecute criminal charges under Fed. R. Crim. P. 42 and Due Process requirements; evidence sufficient; notice adequate; no jury trial required. Affirmed.

JANET CUNARD, Morosco & Cunard, White Plains, N.Y., *for Appellants.*

PETER A. HERBERT, Parcher & Herbert, New York, N.Y., *for Appellees.*

OAKES, *Circuit Judge:*

This appeal by Leon Dymburt and Great American Screen is from a criminal contempt conviction for violating a preliminary injunction. Originally two suits were brought in the United States District Court for the Eastern District of New York, Eugene H. Nickerson, Judge, for commercial exploitation by way of "bootlegging" silkscreened T-shirts. In one suit brought on June 30,

* Sitting by designation.

1978, by Musidor, B.V., and the individuals constituting the "rock" group known as "The Rolling Stones" (the Rolling Stones suit), Judge Nickerson entered a preliminary injunction which upon consent of Great American Screen Designs, Ltd., was made permanent on March 29, 1979. The second suit was brought by Winterland Concessions Co., a California corporation holding commercial rights to the trademarks of the rock groups known as "The Grateful Dead" and "Fleetwood Mac" (the Grateful Dead suit), and on November 30, 1979, Judge Nickerson entered a preliminary injunction in that case also.

When it appeared that Great American and Dymburt were violating the preliminary injunctions against dealing in any goods upon which were displayed a trademark of the respective musical groups, the plaintiffs-appellees sought an order under Federal Rule of Criminal Procedure 42(b)[1] directing the United States Attorney or appointing a special attorney to prosecute charges of criminal contempt. Parcher & Herbert, who represented the plaintiffs-appellees in both actions, were appointed as

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[1] Rule 42(b) reads as follows:

> Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of any attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

special attorneys to prosecute the charges. After hearing evidence the court found that both Dymburt and Great American deliberately violated the order of June 30, 1978, in the Rolling Stones case but found Dymburt innocent, though Great American guilty, of violating the November 30, 1979, order in the Grateful Dead case. A sentence of sixty days was imposed upon Dymburt and concurrent fines of $10,000 were imposed upon Great American.

On appeal the appellants argued that their guilt was not proved beyond a reasonable doubt; that their prosecution by the attorney for a civil litigant violated their due process rights; that the charges were improperly prosecuted; that the appellant Great American was charged with a serious contempt as to which it had a right to trial by jury; and, finally, that their sentences were excessive. We affirm.

Appellants' first point, that guilt was not proved beyond a reasonable doubt, can be readily disposed of. In the Rolling Stones case Judge Nickerson found credible testimony from Paul Keim. Keim worked as a silkscreen technician for Down Home Designs, Ltd., and its successor, Great American Screen Designs, Ltd., from June 1977 to May 1979. According to Keim, the day after the Musidor complaint was filed the defendant Dymburt told him to move ten to twenty screens used to print the Rolling Stones T-shirts, from the Great American premises on the fifth floor of 144 Spencer Street in Brooklyn, New York, to be hidden in the basement of the building. He further testified that through July 1978, after the June 30 preliminary injunction had been issued, the defendants continued to print Rolling Stones T-shirts; the printing was done by night shifts using and then resecreting the screens stored in the basement. While Keim worked only

the day shift, he said he occasionally assisted in moving the screens upstairs. He also said that before he left at night he saw the screens set up on the press to be run, and when he returned in the morning the shirts were "boxed" in plastic bags waiting to be picked up by salesmen. While Keim's testimony was disputed in part by the building superintendent and his assistant, we cannot hold that Judge Nickerson's findings of guilt beyond a reasonable doubt in the case of Dymburt and Great American were clearly erroneous. Appellants also raised several arguments going to Keim's credibility, all of which had been presented at trial in the form of cross-examination, but we find none of them compelling.

The judge's finding of Great American's guilt in the Grateful Dead case is similarly nonreversible. Evidence in the case was based upon testimony of a licensed private investigator, John McNally, who conducted surveillance at 144 Spencer Street on behalf of the plaintiffs. Judge Nickerson accepted his testimony that on May 14, 1980, he trailed a blue Dodge van carrying three cellophane packs of Grateful Dead T-shirts like those he had seen at the offices of plaintiff's counsel. He further testified that he followed the van to the Nassau Coliseum where he purchased a Grateful Dead T-shirt from the passenger in the van. On May 16, 1980, McNally saw a distinctive Chevrolet Nova arrive at 144 Spencer Street, heard the driver ask the elevator operator for the fifth floor and saw the man leave with an armload of cellophane packs containing T-shirts which he put in the trunk of the vehicle. McNally followed the Nova to Nassau Coliseum and proceeded to purchase two Grateful Dead T-shirts from the driver of the car. Appellants on appeal quarrel with the inferences that may be drawn from McNally's testimony, pointing out that McNally could not tell what

was in the plastic bags when they were carried down to the respective van and automobile or what the vehicles had contained before they arrived at the defendant's premises. Appellants also challenge McNally's claim that what he saw in the van were Grateful Dead T-shirts because he saw only a portion of the inscription on them. But these are merely quarrels as to what inferences to draw. And while there was testimony from another silk-screen T-shirt maker that the exhibits could have been printed on one of his own or a competitor's machines, there was no evidence to suggest that in fact they had been so printed, and there was ample evidence to support the verdict.

Appellants next argue that due process was violated by the appointment of civil plaintiff's counsel to prosecute the criminal contempt. The injunctions violated by the appellants were issued in civil actions in which substantial damages were sought. Appellants contend that the prosecuting attorney's financial interest in the outcome of the pending civil actions was an inducement for him to act unfairly in the trial of the contempt charges. Therefore the criminal contempt should have been prosecuted by the United States Attorney or by a disinterested attorney appointed under Rule 42(b).

In the leading case of *McCann v. New York Stock Exchange,* 80 F.2d 211, 214 (2d Cir. 1935), *cert. denied sub nom. McCann v. Leibell,* 299 U.S. 603 (1936), Judge Learned Hand acknowledged that to prosecute a criminal contempt committed outside the presence of the court, "the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information . . . . There is no reason why he should not do so, and every reason why he should . . . ." Appellants are well aware that the Advisory Committee on Rules relied upon

the *McCann* case in establishing Federal Rule of Criminal Procedure 42. In particular, Paragraph (b) of Rule 42 provides that notice clearly describe the criminal contempt so as to obviate the confusion experienced by the accused in the *McCann* proceedings as to whether he was being prosecuted criminally or civilly. Nevertheless, appellants argue that an attorney for a civil litigant is not properly assigned to prosecute another party for criminal contempt, citing *In re Lahm Industries, Inc.*, 609 F.2d 567 (1st Cir. 1979); *Ramos Colon v. United States Attorney for District of Puerto Rico*, 576 F.2d 1 (1st Cir. 1978); and *Kienle v. Jewel Tea Co.*, 222 F.2d 98, 100 (7th Cir. 1955). These cases hold merely that the original civil litigant is not a party in interest and therefore has no standing to prosecute an action for criminal contempt on his own initiative, and thus they lend no support to appellants' argument.

Appellants also cite *Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969), which makes the broad statement that "the National Sovereign, through its chosen law officers, should be in control of criminal contempt proceedings." There the court found a "due process deficiency" because the notice of charges was vague and only one day was allowed to prepare the defense. *Id.* at 318-19. That was not the situation in the case at bar, nor have appellants claimed any such deficiency.

Indeed, we have investigated the record to determine whether there were any conceivable due process violations arising out of the prosecution of the criminal contempt case by the plaintiffs-appellees' counsel, and have found none. The notice of motion under Rule 42(b) spoke clearly of criminal contempt charges and defined the charges in detail; annexed to the motion were affidavits

of the key witnesses, whose testimony was elicited at the contempt hearing. The accompanying memorandum of law specifically referred to 18 U.S.C. § 401, the criminal statute empowering the court to punish disobedience of its lawful orders by fine or imprisonment. The defendants had approximately six months within which to prepare a defense to the charges and to make whatever motions they deemed appropriate. Following the initiation of contempt proceedings, no effort was made by the plaintiffs in the underlying civil litigation to pursue discovery, and for a period of about one year from when the notice of motion was filed, the civil proceedings remained at a standstill. The contempt defendants were afforded the presumption of innocence, were not compelled to testify, and elected not to take the witness stand. No testimony elicited in the civil proceeding, including the testimony at the preliminary injunction hearings, was used at the contempt proceedings. The plaintiffs never sought either damages or costs. The standard of proof applied was guilt beyond a reasonable doubt. Given, then, that all of the customary due process rights in a criminal case were accorded to the plaintiffs-appellants, we distinguish *Brotherhood of Locomotive Firemen* on its facts and decline to follow its sweeping dictum.

Neither Rule 42 nor the Due Process clause requires the court to select counsel from the staff of the United States Attorney to prosecute a criminal contempt. The practicalities of the situation—when the criminal contempt occurs outside the presence of the court but in civil litigation—require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt. There is no fund out of which to pay other counsel in such an event, nor would it be proper that he be paid by the opposing party. This is not the kind of case for which legal aid

societies or public defenders are available. In short, we follow the above quoted statement by Judge Hand in *McCann. See also Frank v. United States,* 384 F.2d 276, 278 (10th Cir. 1967) (SEC attorney appointed in SEC case), *aff'd on other grounds,* 395 U.S. 147 (1969); *United States ex rel. Brown v. Lederer,* 140 F.2d 136, 138 (7th Cir.), *cert. denied,* 322 U.S. 734 (1944). *See generally* Dobbs, *Contempt of Court: A Survey,* 56 Cornell L. Rev. 183 (1971).

Appellants argue that after the motion to appoint an attorney was granted, the charges were not properly prosecuted because no application was made under Rule 42(b) for an order to show cause or an order of arrest, and the prosecution was not brought in the name of the Government. However, we believe that the notice of motion denominated "Notice of Motion to Designate Special Prosecutor of Criminal Contempt Charges" clearly sufficed as an application for an order to show cause. Annexed to the papers were copies of court orders, affidavits of the key witnesses, and a memorandum of law with reference to the appropriate statutes. The defendants were given a detailed description of the charges and a preview of the principal witnesses' testimony. No further technical pleadings were required. *See Yates v. United States,* 316 F.2d 718, 723 (10th Cir. 1963). Appellant Dymburt also claims that he lacked adequate notice of the criminal contempt proceedings because he was not a named party to the Rolling Stones action. But as president and chief operating officer of Great American, Dymburt admittedly was bound by the order enjoining Great American, its officers and directors from engaging in specific prohibited conduct, and his attorney received notice of the motion claiming that Dymburt had violated that order.

Appellants argue that a jury trial was required, although they fail to refer us to any indication in the record that one was requested or sought. The Supreme Court has held that a jury trial must be available in a criminal contempt case only when the offense is more than a petty one. *See Taylor v. Hayes,* 418 U.S. 488, 495 (1974); *Bloom v. Illinois,* 391 U.S. 194 (1968). Relying upon 18 U.S.C. § 1,[2] the Court has determined that a criminal contempt can be deemed a petty offense when the penalty authorized for it does not exceed six months' imprisonment. *Cheff v. Schnackenberg,* 384 U.S. 373, 379 (1966). *See also Codispoti v. Pennsylvania,* 418 U.S. 506, 512 (1974); *Baldwin v. New York,* 399 U.S. 66, 69 (1970); *Frank v. United States,* 395 U.S. 147, 149-50 (1969). In this instance Congress has not expressed a judgment as to the seriousness of the offense by fixing a maximum penalty which may be imposed for criminal contempt. Therefore, under the rule of *Cheff,* readopted in *Bloom,* 391 U.S. at 211, we must look to the penalty actually imposed as best evidence of the seriousness of the offense. 384 U.S. at 379-80. *See also Duncan v. Louisiana,* 391 U.S. 145, 162 n.35 (1968). Since Dymburt's sentence did not exceed six months' imprisonment, his criminal contempt was a petty offense within the meaning of *Cheff, Bloom, Taylor,* and *Baldwin,* and thus he was not entitled to a jury trial.

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2 18 U.S.C. § 1 provides as follows:

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

The case is different with respect to Great American, upon which concurrent fines of $10,000 each were imposed, because 18 U.S.C. § 1(3) limits a fine for a "petty offense" to $500. It might seem to follow, then, that Great American was being tried for a serious offense. However, the Supreme Court held in *Muniz v. Hoffman*, 422 U.S. 454, 475-77 (1975), that the imposition of a fine for criminal contempt, which Congress has not declared to be a serious offense, may exceed the sums specified in 18 U.S.C. § 1. In deciding *Cheff* and the subsequent cases developing the concept of jury trial in the context of criminal contempt,[3] the Court accorded the language of 18 U.S.C. § 1 "no talismanic significance" in cases of fine "unaccompanied by imprisonment." 422 U.S. at 477. Distinguishing imprisonment and fines, the *Muniz* Court went on to observe, "It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual, but it is not tenable to argue that the possibility of a $501 fine would be considered a serious risk to a large corporation or labor union." *Id.* The Court did not reach the issue whether there is any constitutional right to a jury trial where a fine alone is imposed. But it did find that a fine of $10,000 imposed upon a union which collects dues from some 13,000 members is not of such magnitude as to deprive the union of whatever Sixth Amendment right it might have to a jury trial on charges of violating a district court order prohibiting picketing of a publishing plant. In the case at bar there was testimony that Great American had gross revenues of $60,000 to $75,000 from the illicit sale of Rolling Stones T-shirts at a

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3 *See Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Taylor v. Hayes*, 418 U.S. 488 (1974); *Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States*, 395 U.S. 147 (1969); *Bloom v. Illinois*, 391 U.S. 194 (1968).

single performance in Philadelphia, and in light of this and other testimony in the case we cannot say that the fine of $10,000 deprived Great American of a constitutional right, at least where it never made any request for a jury trial.

From what we have said, the argument that the sentences were excessive leaves us totally unpersuaded.

Judgment affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of October, one thousand nine hundred and eight-one.

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MUSIDOR, B.V., and MICHAEL PHILLIP JAGGER, KEITH RICHARDS, WILLIAM GEORGE WYMAN, CHARLES ROBERT WATTS, p/k/a THE ROLLING STONES,

No. 81-1140

Plaintiffs-Appellees,

-v-

GREAT AMERICAN SCREEN, a/k/a BE-DOWN HOME DESIGNS and LEON DYMBURT,

Defendants-Appellants,

----------X

----------X

WINTERLAND CONCESSIONS CO.,
a California Corporation,
d/b/a WINTERLAND CONCES-
SIONS et al.,

Plaintiffs-Appellees,

-v-

GREAT AMERICAN SCREEN
DESIGNS, LTD., a/k/a
DOWN HOME DESIGNS, LTD.,
and LEON DYMBURT a/k/a
LEON BORO,

Defendants-Appellants.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Great American Screen Designs, Ltd. a/k/a Down Home Designs Ltd., and Leon Dymburt a/k/a Leon Boro,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

CONSTITUTIONAL PROVISIONS

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS

(a) FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 42.

CRIMINAL CONTEMPT

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

(b) UNITED STATES CODE PROVISIONS

18 USC

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

28 USC

§ 515. Authority for legal proceedings; commission, oath, and salary for special attorneys

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.

§ 516. Conduct of litigation reserved to Department of Justice

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

§ 547. Duties

Except as otherwise provided by law, each United States attorney, within his district, shall—

(1) prosecute for all offenses against the United States;

(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;

(3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;

(4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and

(5) make such reports as the Attorney General may direct.